

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002110-MR

DARRELL PAUL

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 08-CI-01367

CITY OF LEBANON JUNCTION

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND NICKELL, JUDGES.

NICKELL, JUDGE: Darrell F. Paul appeals from an order entered by the Bullitt

Circuit Court denying his motion for summary judgment in favor of the City of

Lebanon Junction's¹ (the City) cross-motion for summary judgment. The seminal

¹ At all relevant times, the City was a city of the fifth class under Kentucky Revised Statutes (KRS) 81.010(5)—a statute repealed effective January 1, 2015—utilizing the mayor-council plan of government. KRS 83A.140.

issue is whether Paul was wrongly terminated as Chief of Police² by the City's mayor, James Sweat, without a hearing as required by KRS 15.520—known as the Kentucky Policeman's Bill of Rights; KRS 95.765—governing charges against a police officer that may result in removal or discipline; and the City's own Ordinance 2001-11 which according to Paul created a civil service system, but according to the mayor did not. The City posits Mayor Sweat was simply exercising the discretionary power given to him by KRS 83A.080 to remove a police officer "at will", and was neither responding to a professional misconduct complaint nor an alleged violation of a government rule or regulation. Having reviewed the record, the law and the briefs—both original and supplemental—we reverse and remand.

FACTS

The facts are undisputed. On July 30, 2008, Paul was orally terminated as the City's Chief of Police by Mayor Sweat. Less than twenty-four hours later, Paul wrote a letter to the City Council and Mayor Sweat stating:

I hereby request a hearing before the city's legislative body at their earliest convenience.

I wish to have a hearing in which my recent roadside verbal dismissal as Chief of Police, City of Lebanon Junction, by Mayor Sweat would be discussed.

By letter dated July 31, 2008—the next day—Mayor Sweat advised Paul:

² According to a newspaper article included in the trial court record, Mayor Sweat and former Chief Paul disagreed over how much time police officers should devote to patrolling portions of I-65 within the city limits. Mayor Sweat thought it more important for officers to patrol the downtown area instead of monitoring I-65 for drunk drivers and speeders.

As Mayor of the City of Lebanon Junction, based on the authority granted in KRS 83A.130(9) your employment with the City of Lebanon Junction is terminated.

Based on the provisions of Ordinance Number 2001-11 Page 37 Dismissal, my opinion as Mayor is your performance of your duties is unsatisfactory and your recent actions reflects a discredit upon the City of Lebanon Junction.

Based on the provisions of Ordinance Number 2001-11 you may request before me to review this decision within a reasonable time.

No hearing before the mayor was ever requested, and no hearing before the mayor or anyone else ever occurred within or outside the sixty days permitted by KRS 15.520. Paul filed a complaint against the City on October 20, 2008, alleging due process violations as a result of being denied the statutorily mandated hearing and demanded reinstatement with full back pay, benefits and seniority rights. He also demanded compensatory and punitive damages and a jury trial.

After hearing the cross-motions for summary judgment, the trial court found the sole question to be whether Paul's failure to request a hearing before Mayor Sweat "constituted a failure to properly request a termination hearing pursuant to Kentucky statute." The trial court found KRS 15.520 did not apply because termination did not result from a citizen complaint and denied that claim as a matter of law. The trial court then found KRS 95.765 was equally inapplicable because according to Mayor Sweat's affidavit, the City had not adopted a civil service system using the procedure specified in KRS 95.763.³

³ According to Mayor Sweat's affidavit and the ordinance's opening language, it is "a classification plan, compensation plan, policies and procedures for employees of the City of

Having found both KRS 15.520 and KRS 95.765 to be inapplicable, the trial court concluded KRS 83A.080⁴ controlled Paul's termination and no hearing was required.

Paul timely appealed the trial court's award of summary judgment to the City to this Court. On June 23, 2014, on our own motion, we placed the appeal

Lebanon Junction, Bullitt County, Kentucky." The affidavit specifies no civil service commission, as described in KRS 95.763, has ever been created or appointed and none exists.

KRS 95.763 reads:

The mayor, by and with the approval of the legislative body, shall appoint three (3) citizens, who have been taxpayers and voters of the city for five (5) years previous to their appointment, and who shall not be less than thirty (30) years of age, who shall constitute the civil service commission of said city. Such appointees shall originally be appointed for one (1) year, two (2) years and three (3) years, respectively, and the successors of such appointees shall be appointed in like manner, each for a period of three (3) years. Any member of the civil service commission shall be eligible for reappointment. Vacancies shall be filled in the same manner as appointments of said commissioners are made, provided that any person appointed to fill a vacancy shall serve only to the end of the term of the commissioner whose office was vacated. Said commissioners shall elect one (1) of their members as chairman and one (1) as secretary of the civil service commission. Each of said commissioners shall qualify by taking the oath as prescribed by the Constitution of Kentucky.

⁴ KRS 83A.080(3) reads:

All nonelected city officers shall be appointed by the executive authority of the city and, except in cities of the first class, all these appointments shall be with approval of the city legislative body if separate from the executive authority. The officers may be removed by the executive authority at will unless otherwise provided by statute or ordinance. Upon removal of a nonelected officer at will, the executive authority shall give the officer a written statement setting forth the reason or reasons for the removal. However, this requirement shall not be construed as limiting in any way the at-will dismissal power of the executive authority.

KRS 83A.190(9) reads:

in abeyance pending our Supreme Court's completion of discretionary review in *Pearce v. University of Louisville, by and through its Board of Trustees*, 448 S.W.3d 746 (Ky. 2014) and *Beavers v. City of Berea*, 2010-CA-001522-MR, 2012 WL 28690 (Ky. App. Jan. 6, 2012, DR Granted Feb. 11, 2015). *Pearce*⁵ having been rendered in December 2014, Paul moved to cite *Pearce* and asked that the appeal be removed from abeyance. The City agreed returning the appeal to the active docket was appropriate, but argued *Pearce* was not dispositive because Mayor Sweat was simply exercising the statutory authority vested in him by KRS Chapter 83A, and further argued, if KRS 15.520 applied, the most Paul was entitled to was a hearing before the mayor which Paul never requested. *City of Munfordville v. Sheldon*, 977 S.W.2d 497, 499 (Ky. 1998) (where police chief arrested man who subsequently became mayor and then terminated his employment due in part to citizen complaint, mayor could fire police chief at will under KRS 83A.080(2), but a public hearing before the mayor was required within sixty days under KRS 15.520 to allow former police chief to defend and protect his professional and personal reputation from permanent damage).

We removed the appeal from abeyance and returned it to the active docket on March 20, 2015. More than two years having passed since the filing of

The mayor shall be the appointing authority with power to appoint and remove all city employees, including police officers, except as tenure and terms of employment are protected by statute, ordinance or contract and except for employees of the council.

⁵ *Beavers* remains on discretionary review.

the original briefs in 2012, we ordered simultaneous filing of supplemental briefs. Those briefs have now been filed and we are prepared to render our decision.

ANALYSIS

In a nutshell, Paul argues he is entitled to reinstatement, back pay and benefits because he was dismissed by Mayor Sweat without a due process hearing. We are cited to three statutes and one ordinance that may or may not resolve the dilemma. Two of the statutes—KRS 15.520 and KRS 95.975—require a hearing to satisfy due process before a police officer may be terminated from a unit of government participating in the Kentucky Law Enforcement Foundation Program (KLEFP) mentioned in KRS 15.430. It is undisputed the City participates in this program and receives KLEFP funds. Importantly, neither KRS 15.520 nor KRS 95.975 require a police officer facing discipline to request the mandated hearing.

At first blush, KRS 83A.130(9)—authorizing a mayor to terminate a police officer “at will” without any mention of a hearing—appears to be in conflict. But upon closer inspection, KRS 15.520 and KRS 95.975 do not curtail a mayor’s discretion to dismiss a police officer at will, they merely entitle the officer to a hearing and the opportunity to create a public record.

We do not write on a clean slate regarding which of these statutes applies. In *Pearce*, our Supreme Court held administrative due process rights afforded police officers by KRS 15.520 apply equally

to both disciplinary proceedings generated by citizen complaints and those initiated by intra-departmental actions[.]

Prior to *Pearce*, this Court routinely limited the application of KRS 15.520 to terminations resulting from citizen complaints. *Pearce*, 448 S.W.3d at 750. We now know that approach was inaccurate and conclude a due process hearing is mandated prior to dismissal of any police officer. This holding does not eliminate a mayor's discretion to fire an officer at will—without cause or reason⁶—so long as there is no statutory prohibition under KRS 83A.080(2); it simply gives the officer the opportunity to defend his/her reputation and actions in a public forum. *Pearce*, 448 S.W.3d at 753. Furthermore, because KRS 15.520 is more specific than KRS 83A.080, and was enacted later in time, it controls over the same or similar subject matter and any perceived conflict between the two statutes yields to KRS 15.520. *Withers v. University of Kentucky*, 939 S.W.2d 340, 345 (Ky. 1997). We need not address whether Ordinance 2001-11 requires a hearing because it too must yield to KRS 15.520.

As noted previously, neither KRS 15.520 nor KRS 95.975 puts the onus on an officer to request a hearing. In fact, KRS 15.520(7) was recently amended to read:

[u]nless waived by the charged officer in writing, a hearing shall be conducted by the officer's appointing authority to determine whether there is substantial evidence to prove the charges and to determine what, if any, disciplinary action shall be taken if substantial evidence does exist. In conducting a hearing, the

⁶ An employer may generally dismiss an at-will employee “for good cause, for no cause, or for a cause that some might view as morally indefensible[.]” *Grzyb v. Evans*, 700 S.W.2d 399, 400 (Ky. 1985) (internal citations omitted).

following administrative due process rights shall be recognized and these shall be the minimum rights afforded any officer charged, except as otherwise agreed to in writing by the officer and the employing agency[.]

[Emphasis added]. This change punctuates the requirement that the due process hearing occur automatically, and solidifies our conclusion that no hearing need be requested by the officer.

Having determined Paul was entitled to a hearing he did not receive, we reverse and remand with direction that the trial court apply KRS

15.520(1)(h)(8) which reads:

[a]ny police officer suspended with or without pay who is not given a hearing as provided by this section within sixty (60) days of any charge being filed, the charge then shall be dismissed with prejudice and not be considered by any hearing authority and the officer shall be reinstated with full back pay and benefits[.]

Thus, Paul is to be reinstated as Chief of Police and is to receive full back pay and benefits.

ALL CONCUR.

BRIEF FOR APPELLANT:

Garry R. Adams
Daniel J. Canon
Louisville, Kentucky

BRIEF FOR APPELLEE:

Michael T. Burns
Louisville, Kentucky